

1
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

FRANCIS FOGARTY, JR.,

Plaintiff,

Civil Case No. 15-v-01454
(GLS/DJS)

-against-

CITY OF TROY and City of Troy Police Officers KYLE JONES and ROBERT SMITH, both individually and/or as agents, servants, and/or employees of the City of Troy,

Defendants

EXAMINATION BEFORE TRIAL of the Defendant, Troy Police Officer **KYLE JONES**, held pursuant to notice, on January 23, 2017, at 11:05 a.m. in the law offices of Bailey, Johnson, DeLeonardis & Peck, PC, Pine West Plaza 5, Suite 507, Washington Avenue Extension, Albany, New York, before Mary Ellen Tardiff, a Shorthand Reporter and Notary Public in and for the State of New York.

APPEARANCES:

For the Plaintiff:

THE KINDLON LAW FIRM, PLLC
74 Chapel Street
Albany, New York 12207
GENNARO D. CALABRESE, ESQ.

2

For the Defendant City of Troy:

RICHARD T. MORRISSEY, ESQ.

Corporation Counsel

City of Troy

245 River Street

Troy, New York 12180

For the Defendants Kyle Jones and Robert Smith:

Bailey, Johnson, DeLeonardis & Peck, PC

Pine West Plaza 5, Suite 507

Washington Avenue Extension

Albany, New York 12205

BY: JOHN W. BAILEY, ESQ.

Also Present:

Robert Smith

S T I P U L A T I O N S

IT IS HEREBY STIPULATED AND AGREED by and between the attorneys for the respective parties hereto that presence and oath of a Referee be waived;

IT IS FURTHER STIPULATED AND AGREED that the transcript be signed and that the filing of the original transcript with the Federal Court be waived;

IT IS FURTHER STIPULATED AND AGREED that all objections, except as to form, are reserved until the time of trial;

IT IS FURTHER STIPULATED AND AGREED that this

1 deposition may be utilized for all purposes as
2 provided by the Federal Rules of Civil Procedure;

3 AND FURTHER STIPULATED AND AGREED that all rights
4 provided to all parties by the Federal Rules of Civil
5 Procedure shall not be deemed waived and the
6 appropriate sections of the Federal Rules of Civil
7 Procedure shall be controlling with respect thereto.

8
9 (Plaintiff's Exhibits 1, 2, 3, 4
10 and 5 were marked for identification.)

11
12 K Y L E J O N E S ,
13 having been first duly sworn by the Notary Public, was
14 examined and testified as follows:

15 **EXAMINATION BY MR. CALABRESE:**

16 Q. My name is Gennaro Calabrese. I'm an
17 attorney with the Kindlon Law Firm. I represent the
18 plaintiff, Francis Fogarty. Could you state your name
19 for the record?

20 A. Kyle Jones.

21 Q. I'll go over a couple of ground rules for
22 the deposition. One, all the answers have to be
23 verbal so the court reporter can have a full and

1 complete transcript. Okay?

2 A. Sure.

3 Q. Kindly wait for me to answer my question
4 even though you may know what I'm going to say before
5 you answer so, again, we can have a full and complete
6 transcript. Okay?

7 A. Yes.

8 Q. If you need a break, please let me know
9 but kindly answer the question before you take that
10 break. Okay?

11 A. Yes.

12 Q. And if you answer a question without
13 telling me you don't understand it, we're going to
14 presume you understood what I was asking. Okay?

15 A. Okay.

16 Q. So it's important if you don't understand
17 or anything I say doesn't make sense to you please,
18 let me know so I can change it. Okay?

19 A. Yes.

20 Q. Have you consumed anything in the last 24
21 hours that may impair your ability to think clearly
22 today?

23 A. No.

1 Q. Have you ever been a named party in a
2 lawsuit before?

3 A. Yes.

4 Q. As a plaintiff or a defendant?

5 A. It was through work so I would assume
6 defendant. I was a police officer.

7 Q. It was in your capacity as a police
8 officer?

9 A. Yes.

10 Q. How long ago was that lawsuit?

11 A. 2011, 2012, somewhere in there.

12 Q. Who was your attorney?

13 A. Ian Silverman was the corporation counsel
14 through the city.

15 Q. Do you remember the name of the plaintiff
16 in that lawsuit?

17 A. Brian Houle.

18 Q. And do you remember how that resolved?

19 A. There was a settlement the city, the city
20 paid.

21 MR. BAILEY: Objection.

22 Q. I guess without stating how much it
23 settled for, you can say that it settled?

1 A. Yeah, it settled. I don't even really
2 remember the exact amount.

3 Q. You don't even have to say the amount.

4 A. Yeah, it was settled.

5 Q. Okay. Do you remember, were there any
6 other named defendants in that lawsuit?

7 A. I don't. It involved me. I don't know if
8 there was other officers or the city or -- I don't
9 remember what was on the lawsuit.

10 Q. All right. So beside that lawsuit, have
11 you been a named party in any other lawsuit?

12 A. Not that I can remember.

13 Q. All right. Have you ever sat for a
14 deposition before?

15 A. Yes. Yeah.

16 Q. Was it in that lawsuit that we just talked
17 about?

18 A. No.

19 Q. All right. Was it an administrative
20 proceeding?

21 A. I guess. I don't -- I was a witness to
22 another lawsuit in my capacity as a police officer when
23 I was employed by the Town of North Greenbush.

1 Q. Do you remember what year that was?

2 A. I don't.

3 Q. Do you remember the name of the plaintiff?

4 A. I don't know if the guy was suing the chief
5 or the Town of North Greenbush back then. I don't know
6 what he was actually, what his goal was. I don't know
7 what the lawsuit was for.

8 Q. Okay. Do you remember what the lawsuit
9 was about?

10 A. I think it was because he was getting
11 stopped or harrassed by the police or he thought he
12 was. He thought, like, the chief or the town
13 supervisor or somebody was, like, directing people to
14 do that to him so that myself and other officers were
15 called in in the deposition process, I think.

16 Q. Did you sit for any other depositions
17 beside the one you just mentioned?

18 A. No.

19 Q. Have you ever testified as a witness in a
20 civil proceeding? Meaning, have you ever testified at
21 a trial in a civil proceeding?

22 A. No.

23 Q. Have you ever testified in an

1 administrative proceeding?

2 A. Nope.

3 Q. Okay.

4 MR. BAILEY: Just note my
5 objection to the form of that. Would
6 you mean -- just so we would get a
7 clear answer for it, Gennaro,
8 "administrative" meaning what, for
9 example, because there's all kinds of
10 administrative proceedings. Is there
11 something specific? I don't want to
12 be misunderstood.

13 MR. CALABRESE: I was thinking of
14 any other proceeding not involving a
15 lawsuit.

16 MR. BAILEY: Okay.

17 MR. CALABRESE: So with a hearing
18 officer.

19 MR. BAILEY: All right. So like a
20 disciplinary hearing or a labor
21 dispute or something of that kind.
22 Okay. All right. Can you think of
23 anything, Officer Jones, that you

1 testified in that you could tell Mr.
2 Calabrese about?

3 THE WITNESS: In terms of like a
4 disciplinary hearing or of that
5 nature, no.

6 Q. And you've testified in criminal
7 proceedings before?

8 A. Yes.

9 Q. You've testified at hearings in a criminal
10 proceeding?

11 A. Yes.

12 Q. You've testified at pre-trial hearings?

13 A. Yes.

14 Q. And you've testified at suppression
15 hearings?

16 A. Yes.

17 Q. You've testified before a grand jury
18 before?

19 A. Yes, I have.

20 Q. And you've testified at a trial in a
21 criminal proceeding?

22 A. Yes.

23 Q. And that's something you do in the course

1 of your employment as a City of Troy police officer?

2 A. Correct.

3 Q. What materials, if any, did you review
4 prior to coming to this deposition?

5 A. The materials were the incident reports,
6 some audio files of Internal Affairs, things like that
7 pertaining to the arrest report and incident report.
8 Things of that nature.

9 Q. Did you have any notes that you've taken
10 that you reviewed prior to coming here today?

11 A. No.

12 Q. So would it be fair to say any documents
13 reviewed were documents that are in the possession of
14 the City of Troy Police Department?

15 A. Yes.

16 Q. Okay. Now, beside your attorneys, did you
17 speak to anyone in preparation of today's deposition?

18 A. No.

19 Q. Is it fair to say you're currently
20 employed by the City of Troy Police Department?

21 A. Yes, I am.

22 Q. How long have you been employed by them?

23 A. Almost six years.

1 Q. Are you currently employed by any other
2 police department?

3 A. Yes.

4 Q. Part time?

5 A. Yes.

6 Q. With whom?

7 A. The Village of Green Island Police
8 Department.

9 Q. How long have you been employed by the
10 Village of Green Island?

11 A. Just about a year. Coming up, about a year.

12 Q. Have you been employed by any other law
13 enforcement agencies?

14 A. Yes.

15 Q. Who?

16 A. The Town of North Greenbush.

17 Q. And between what years were you employed
18 by the Town of North Greenbush?

19 A. July of 2008 to May -- actually the end of
20 April, 2011.

21 Q. Did you work there full time at first?

22 A. I was a full time police officer there, yes.

23 Q. And eventually you moved to part time?

1 A. No.

2 Q. So you went from North Greenbush to Troy?

3 A. Correct.

4 Q. Okay. Were you --

5 A. Both full time police officers.

6 Q. But they didn't overlap, right?

7 A. Correct.

8 Q. Okay. Did you work for any other law
9 enforcement agencies?

10 A. Other than the ones I mentioned, no.

11 Q. Okay. So have you had the opportunity to
12 review the Complaint in this matter?

13 A. What do you mean by "the Complaint"?

14 Q. Have you had the opportunity to review the
15 document in which Francis Fogarty makes his
16 allegations?

17 A. Yes.

18 Q. All right. So you are aware of the
19 allegations Mr. Fogarty is making?

20 A. Yes.

21 Q. Can you tell me in your own words how you
22 came to first interact with Mr. Fogarty?

23 A. He was involved in an altercation and I

1 ultimately, you know, met him during that altercation
2 and arrested him for the altercation.

3 Q. All right. So when you say Mr. Fogarty
4 was involved in an altercation, what did you see?

5 A. Initially I saw him arguing with who I now
6 know to be his wife at the time, or fiancée -- I'm not
7 sure what capacity they were, but his significant other
8 -- on the street. That escalated to him arguing with
9 other citizens on the street. And that's when I
10 initially came into contact with him, the reason for me
11 to speak to him that night.

12 Q. All right. So where were you when you
13 first saw Mr. Fogarty?

14 A. I was parked in a -- I was in a marked
15 police car in uniform. Parked in the Franklin Street
16 alley basically on Franklin Street at Broadway but on
17 the south side of Broadway out in the open. Visibly
18 parked there in a patrol car sort of observing the
19 crowds.

20 Q. So would it be fair to say your vehicle
21 was parked facing Bootlegger's?

22 A. Yeah, that's correct. I was sitting and it
23 was facing Bootlegger's, yes.

1 Q. So in your view could you see the entire
2 front facade of Bootlegger's?

3 A. Yes.

4 Q. And what drew your attention to Mr.
5 Fogarty?

6 A. There was -- there was a commotion involving
7 Mr. Fogarty.

8 Q. When you say "commotion," what do you
9 mean?

10 A. Yelling. Screaming. Animated gestures.
11 Arms flailing in the air. You know, what in my
12 experience would be two people arguing and having a
13 disagreement, verbal disagreement.

14 Q. And that was between him and his ex-wife?

15 A. Yes. Another female but now that we do
16 know, it was her.

17 Q. If I say Sarah Fogarty, you know who I'm
18 talking about?

19 A. Yes.

20 Q. So it was between Mr. Fogarty and Miss
21 Fogarty?

22 A. Correct.

23 Q. So you see the two of them exchanging

1 words and, as you said, flailing their arms. What did
2 you observe happen next?

3 A. There was, there was yelling and screaming.
4 There was pushing and shoving, physical fight.

5 Q. Between whom?

6 A. Between Mr. Fogarty and another patron or
7 citizen, bystander standing on the sidewalk.

8 Q. As you sit here today do you remember who
9 that was?

10 A. I don't.

11 Q. So how much time lapsed between his
12 confrontation with Miss Fogarty and him exchanging
13 shoves with another individual?

14 MR. BAILEY: Object to the form.

15 You can answer.

16 A. I'm trying to just answer the best I can.
17 The time between the argument or disagreement between
18 Miss Fogarty and then the citizen, the other bystander?
19 Is that what you're asking?

20 Q. It's my understanding you testified there
21 was some pushing and shoving that you observed?

22 A. Yes.

23 Q. Who was that between?

1 A. That initially was between the citizen and
2 Mr. Fogarty.

3 Q. Okay. So how much time lapsed between
4 when you observed Mr. Fogarty and the other citizen
5 making contact and Mr. Fogarty and Miss Fogarty having
6 a verbal confrontation?

7 MR. BAILEY: Object to the form.

8 A. I mean I could try to give you --

9 MR. BAILEY: Yes. It's not
10 appropriate for me to intervene, but I
11 do object to the form. You want to go
12 off the record for one second?

13 (Discussion was held off the
14 record.)

15 Q. So there came a point in time where you're
16 sitting in the patrol car, correct?

17 A. Yes, sir.

18 Q. And you see a confrontation between whom
19 you now know to be Miss Fogarty and Mr. Fogarty?

20 A. Correct.

21 Q. It's my understanding what you saw was the
22 exchange of words and hand movements?

23 A. Yes.

1 Q. Okay. And then there came a point where
2 you saw Mr. Fogarty have physical contact with another
3 individual, right?

4 A. That eventually did happen, yes.

5 Q. How much time lapsed between Mr. Fogarty's
6 confrontation with Miss Fogarty and the physical
7 contact with another individual?

8 A. It's important to add that there was
9 physical confrontation between Mr. And Mrs. Fogarty
10 prior to Mr. Fogarty also having an additional physical
11 confrontation with another male. To try to answer the
12 question the best I can, I would say the physical
13 confrontation between Mr. Fogarty and Miss Fogarty
14 occurred. There was a break in physical altercation.
15 Verbal disagreements continued maybe 30 to 40 seconds
16 to a minute or minute 30 seconds. It's been a while.
17 You know, I don't -- I'm trying to give you the best
18 time frame. It certainly wasn't 15 minutes but, you
19 know, we're talking a block of seconds, of 30 second
20 to, you know, maybe two minutes, that type of a time
21 frame between the time that Mr. Fogarty had the
22 altercation with the male and, the physical altercation
23 with the male.

1 Q. What type of physical contact did you see
2 between Mr. Fogarty and Miss Fogarty?

3 A. They were pushing and shoving, slapping.
4 You know, hands-on.

5 Q. Did you see -- did you see Mr. Fogarty
6 slap Miss Fogarty, or was it the other way around, or
7 was it both?

8 A. I believe I remember both. You know, both
9 put hands on each other.

10 Q. Was this on the sidewalk in front of
11 Bootlegger's or was this in the street or someplace
12 else?

13 A. I would say both. It was both the sidewalk
14 that spilled out to the roadway.

15 Q. Meaning the confrontation between Mr.
16 Fogarty and Miss Fogarty?

17 A. Correct.

18 Q. Okay. Now, were they at any point in
19 time, prior to Mr. Fogarty having a physical contact
20 with another individual, did Mr. Fogarty leave your,
21 you know, your view?

22 A. In terms of leaving my view, it's my
23 recollection he stayed within that immediate area. But

1 you know, as far as my attention always drawn to him,
2 there was a lot of people there moving around. So, you
3 know, my attention bounced between other subjects that
4 were there. But he didn't leave the area.

5 Q. What, if anything, did you do when you
6 observed Mr. Fogarty and Miss Fogarty have physical
7 contact with each other?

8 A. I got out of my patrol car and tried to
9 speak with Mr. Fogarty.

10 Q. Okay. And when you say "tried to speak
11 with" him, why do you say "try"?

12 A. It was difficult to get his attention. He
13 was agitated. He appeared as though he was
14 intoxicated. He, you know, didn't necessarily care or
15 understand that a police officer in uniform, you know,
16 there was a presence, that I was there. And he didn't
17 care that I was there or I was even explaining to him,
18 listen to me. You need to stop what you're doing.

19 Q. When you walked out of your patrol car,
20 fair to say you walked directly over to where Mr.
21 Fogarty was?

22 A. Yes.

23 Q. What, if anything, did you do to get his

1 attention?

2 A. I don't remember my, the context of my exact
3 words. But, you know, I would imagine I'd say, hey,
4 sir. Hey, buddy. Something to that nature to get his
5 attention. Stop. Look at me. Talk to me. Something
6 of those, of that nature.

7 Q. Did he -- did he say anything to you when
8 you were approaching him?

9 A. Not that I can remember.

10 Q. After you said something to him, do you
11 remember him saying anything to you at that point?

12 A. I mean, the exchange between myself and him
13 is specifically when I was trying to arrest him. And I
14 was telling him he was under arrest and that to put his
15 hands behind his back. What I recall about the
16 incident was him saying, you're not going to arrest me.
17 I don't do anything wrong. Arrest her. He didn't want
18 to be arrested.

19 Q. Where did this take place? Was it on the
20 sidewalk, in the street, or someplace else?

21 A. I remember it being in the street. I mean,
22 it could have carried over from the sidewalk and back
23 at the street. We weren't stationary, you know. We

1 weren't standing in one spot.

2 Q. So you testified that you told Mr. Fogarty
3 he was under arrest. What were you going to place him
4 under arrest for?

5 A. For, you know, hitting at -- hitting the
6 female. Hitting the male.

7 Q. And again, you observed -- you said you
8 observed Mr. Fogarty slapping Miss Fogarty?

9 A. Correct.

10 Q. Did you observe him doing anything else to
11 her?

12 A. Like I said, you know, push her. Shove her.
13 That type of thing.

14 Q. And okay. Just so I understand, you got
15 out of the car, patrol car, after you saw Mr. Fogarty
16 have contact with another individual?

17 A. And I can't -- it's been, you know, over
18 four years. I don't remember exactly when I exited the
19 patrol car, you know, specifically like you're asking.
20 I got out at sometime during what I described to you as
21 happening. I did get out of my car to get on foot and
22 approach, approach the people.

23 Q. Can you testify as to at what point you

1 observed Mr. Fogarty having contact with another
2 individual?

3 A. What do you mean? By what point?

4 Q. I mean, was it -- do you know, was it
5 before or after you got out of the car?

6 A. That's what I'm trying. I mean, I'd like to
7 be able to tell you exactly when. Just it's been a
8 long time. I know at some point in time the sequence
9 of events occurred like I described, and then I get out
10 of the car. I continued to watch what's going on. I
11 get out of the car at some point. To be able to tell
12 you when exactly I got out, I don't remember that.

13 Q. Do you remember seeing any other persons
14 having physical contact with Mr. Fogarty?

15 A. Like I described, he punched or shoved. He
16 had physical contact with a guy on the sidewalk. He
17 had physical contact with Mrs. Fogarty. It's possible
18 that there is, you know, while he was being violent or,
19 you know, trying to fight other people that somebody
20 may have grabbed him and tried to hold him back. I
21 remember that. But specifically like him punch
22 somebody else in the face, I don't.

23 Q. Do you remember anybody punching or

1 pushing Mr. Fogarty besides Miss Fogarty?

2 A. Not that I can remember, no.

3 Q. And would it be fair to say as you were in
4 the patrol car your focus was on that street and that
5 sidewalk in front of Bootlegger's, right?

6 MR. BAILEY: Object to the form.

7 You can answer.

8 A. My -- yeah. My intentions were to park the
9 patrol car, marked patrol car, in an area highly
10 visible so it would be the deterrent for such events,
11 like a fight or a disturbance.

12 Q. All right. Why did you -- you parked the
13 car facing Bootlegger's. Is there a reason why you
14 were going to park the patrol car to have that view?

15 A. There is a reason. In my experience and as
16 directed by our supervisors, at that time of the night
17 between, you know, certain hours when the bars are
18 closing and a group of intoxicated subjects are all
19 kind of coming out at once, we try to, you know, park
20 in an area that's well lit and highly visible to be a
21 deterrent of, you know, quality of life, urinating in
22 the alleys and fights and just, you know, criminal
23 mischief to cars. All these things that,

1 unfortunately, occur when a group of intoxicated people
2 are in close proximity. So that was my intention and
3 the reasons behind me being in that specific spot on
4 that night.

5 Q. Is there a reason you approached Mr.
6 Fogarty instead of first approaching Miss Fogarty?

7 A. I initially got out of the car and approached
8 all of them. I didn't single anybody out. I got out
9 and approached all of them. I mean Mr. Fogarty, Mrs.
10 Fogarty, the other individual that was involved or
11 struck by Mr. Fogarty, and I addressed them all. And,
12 I mean, I remember the other people on the sidewalk
13 sort of, you know, creating a crowd or circling and I
14 have them disburse as well.

15 Q. Okay. So when you approached, how close
16 were the three of them to each other?

17 MR. BAILEY: Objection. At what
18 point in time?

19 Q. When you approached them?

20 A. I would best describe it as they were
21 standing within close proximity. I mean, you know, the
22 conversation probably within the same distance we're
23 sitting apart from each other, five to ten feet.

1 Q. As you were approaching them were they
2 having conversations with each other?

3 A. I mean, they were animated. They were all
4 gesturing and, you know, they were upset. They were
5 intoxicated or at least appeared to be drunk, moving
6 around and everybody was kind of all cross conversating
7 and yelling and --

8 Q. When you first approached that group, do
9 you remember what you said?

10 A. Specifically to what I said? I don't
11 remember that. I don't remember.

12 Q. Is there a reason you focused your
13 attention on Mr. Fogarty instead of either Miss
14 Fogarty or the other individual who was involved in
15 the confrontation with you?

16 MR. BAILEY: Object to the form.
17 You can answer. Asked and answered,
18 but he can answer.

19 A. Mr. Fogarty, you know, as I said, I was
20 parked there observing a lot of people and Mr. Fogarty
21 was getting my attention, you know, meaning he was
22 agitated. He was, you know, yelling at the female,
23 Mrs. Fogarty. He was yelling at the other citizen.

1 They had -- he was involved in a verbal altercation.
2 He was flailing his arms around. That escalated to
3 some physical altercations between Mrs. Fogarty and
4 another, another citizen that was there where other
5 people were just simply standing around not fighting,
6 Mr. Fogarty, you know, had committed, had committed a
7 crime. Was yelling and screaming and causing a
8 disturbance. So my attention focused towards him.

9 Q. When you say he committed a crime, what
10 penal law or what penal violations did he commit?

11 A. Initially when he, you know, slapped or
12 punched or physically contacted another person, either
13 Mrs. Fogarty or the other citizen on the road or the
14 sidewalk, he committed harassment. You know, the penal
15 law violation of harassment.

16 Q. So when you told -- you testified earlier
17 that you told Mr. Fogarty he was under arrest, right?

18 A. Yes, sir.

19 Q. And so is it fair to say that he was under
20 arrest for harassment second degree?

21 A. Yes.

22 Q. And you testified -- just so it's clear --
23 you testified earlier, just so it's clear for me, were

1 you arresting him for his physical contact with Miss
2 Fogarty, his physical contact with the other civilian,
3 or both?

4 A. I'd have to look at the context of the to
5 wit section in the harassment accusatory in order to,
6 you know, give you a very, very specific answer to
7 that. I mean, you know, he committed the violation and
8 that was why I approached him and started to place him
9 under arrest.

10 Q. Did you have any intention of also issuing
11 -- did you have any attention of also charging Miss
12 Fogarty with harassment second?

13 MR. BAILEY: Object to the form.

14 You can answer.

15 A. Intention of arresting her? I mean, look,
16 in a perfect world if I could have had more police
17 officers there and we could have arrested everybody
18 that was causing the issue, then it would have been
19 possible to do that. But I was only one person at the
20 time. So I had to pick, you know, the primary
21 aggressor, so to speak, which I determined to be Mr.
22 Fogarty and the fact that he, you know, harassed Mrs.
23 Fogarty and then also a citizen and then was escalating

1 from there.

2 Q. Is it fair to say that when you approached
3 Mr. Fogarty you didn't have to restrain him from
4 having physical contact with anybody?

5 MR. BAILEY: Object to the form.

6 A. I didn't have to restrain him? No. My -- I
7 didn't put hands on him to prevent him from striking
8 anybody else if that's what you're asking.

9 Q. When you approached him he wasn't hitting
10 anybody, right?

11 MR. BAILEY: Object to the form.

12 A. Actively hitting somebody?

13 Q. Right.

14 A. No, he wasn't when I initially approached
15 him. He had already done so.

16 Q. And as you were walking from your patrol
17 car toward Mr. Fogarty, Mr. Fogarty was standing in
18 the street or on the sidewalk, right?

19 A. Yes.

20 Q. And he may have been exchanging words. He
21 may have been flailing his arms. But he wasn't having
22 any physical contact with anybody else during that
23 time that you approached him?

1 MR. BAILEY: Object to the form.

2 You can answer.

3 A. Correct.

4 Q. Okay. And when you approached Mr. Fogarty
5 and you told him that he was under arrest what, if
6 anything, did Miss Fogarty do at that point?

7 A. I don't remember if Miss Fogarty was
8 standing right next to us right at that moment or if
9 she was some distance away. So I don't know that she
10 specifically did, you know. I can't remember the
11 specific action that she did right when I told him that
12 he was under arrest.

13 Q. When you were walking toward Mr. Fogarty
14 did Miss Fogarty start walking in a different
15 direction?

16 A. My recollection is that she was still there,
17 you know, but I don't remember her walking away from
18 the area.

19 Q. As you sit here today do you remember
20 specifically, can you describe specifically the
21 physical contact that Mr. Fogarty had with the other
22 civilian?

23 A. My best recollection is that it was

1 harassment in nature. He either punched the male, you
2 know, in the face or the chest or, you know,
3 aggressively pushed him. That type of a contact.

4 Q. And again after testifying does it refresh
5 your recollection as to if you left the patrol car
6 before or after Mr. Fogarty had contact with that
7 other civilian?

8 A. I don't understand.

9 Q. Sure.

10 A. Sorry.

11 Q. Before I ask if you got out of the patrol
12 car before Mr. Fogarty had contact with the other guy.
13 Since we've been talking about it, do you now
14 remember?

15 A. I still don't remember when I exited the
16 patrol car specifically.

17 Q. Did you strike Mr. Fogarty outside of
18 Bootlegger's?

19 A. No.

20 Q. Can you, in detail, describe your
21 interaction with Mr. Fogarty outside of Bootlegger's?

22 A. Sure. When I approached him to explain to
23 him that he was under arrest, I tried to verbally tell

1 him to put his hands behind his back to place him in
2 custody. He, as I said before he, you know, refused to
3 do that. He -- when I would try to grab his arms to
4 sort off of coach him to put his hands behind his back,
5 he violently pulled his hands away and his arms away.
6 He physically elbowed me in the face during the process
7 of me trying to place him under arrest. He continued
8 to resist arrest specifically pulling his hands away,
9 you know, refusing to listen to my orders.

10 And then subsequent Sarah Fogarty got involved.
11 She came from behind. Pulled me. Punched me. Pushed
12 me in a fashion to sort of keep me from arresting Mr.
13 Fogarty and then Mr. Fogarty, because of that sort of
14 interruption, he was able to get up and run away.

15 Q. Where did Mrs. Fogarty punch you?

16 A. From what I remember she came from behind,
17 so like my back or side. Grabbed at me to try to get
18 me, to pull me away from Mr. Fogarty.

19 Q. And you said Mr. Fogarty was able to get
20 up and run?

21 A. Correct.

22 Q. At what point was he on the floor?

23 MR. BAILEY: Object to the form.

1 Q. Was Mr. Fogarty ever on the floor?

2 MR. BAILEY: Again, object to the
3 form. I think it's a street or a
4 sidewalk, not a floor.

5 Q. Let me ask it again then. At any point in
6 time was Mr. Fogarty on the street or sidewalk in
7 front of Bootlegger's?

8 A. It's possible that he, in the process of me
9 trying to physically place him under arrest using my
10 hands that, you know, he lost his footing or bent over
11 and put his hand or maybe a knee on the pavement of the
12 roadway. My intentions were to try to get him to put
13 his hands behind his back and ultimately, you know, if
14 I have to take somebody to the ground to do that,
15 that's the safest position, you know, for me to do
16 that. I didn't get -- in the process of trying to do
17 that is when Sarah Fogarty interrupted and attacked me.
18 And so to answer your question about being on the
19 floor, at no point in time do I remember him laying on
20 the ground or the pavement. But when I said the words
21 get up and flee, just sort of remove himself from where
22 I was trying to place him into custody.

23 Q. Did you have a taser on you?

1 A. I don't remember if I was equipped with one
2 that night.

3 Q. You had a baton on you, right?

4 A. Yes.

5 Q. When you stepped out of the patrol car and
6 walked toward Mr. Fogarty, did you have your baton in
7 hand?

8 A. I don't specifically remember if I had it in
9 my hand or holstered when I first exited the vehicle.
10 At some point in time I did have, throughout that
11 altercation I did have the baton in my hand because I
12 recall when I was running I was holding onto it so it
13 wouldn't fall out or get lost.

14 Q. Do you remember at what point you took it
15 out?

16 A. Specifically, I do not. During, during that
17 incident I remember having it out. Specifically when,
18 I don't remember.

19 Q. Before you got out of the patrol car did
20 you use the radio?

21 A. What do you mean by "use the radio"?

22 Q. Did you call in stating that there are
23 physical altercations outside of Bootlegger's?

1 A. At some point in time I did, yes, get on the
2 radio, notify the dispatcher of my location and what
3 type of incident I had.

4 Q. Do you remember whether or not you did
5 that before you approached Mr. Fogarty?

6 A. I don't. There is a record of it but, you
7 know, I haven't -- it's been almost four years and I
8 haven't listened to it since then. So I don't -- I
9 mean, specifically what the transmissions were, I
10 don't. I assume there's a record still on file and
11 that can be reviewed, but I don't remember.

12 Q. Have you ever made an arrest in front of
13 Bootlegger's before?

14 A. I can't specifically -- like, there isn't an
15 arrest that stands out. It's possible that I did and
16 it's possible that I haven't either. I don't remember
17 specifically anyone that stands out in front of
18 Bootlegger's.

19 Q. Prior to this incident at any point in
20 time did you ever review the security footage -- let
21 me withdraw that and say that again. Prior to your
22 interaction with Mr. Fogarty, at any point in time in
23 your role as a Troy police officer did you have the

1 opportunity to review security footage from
2 Bootlegger's?

3 A. I don't remember any specific incidents
4 where I could say, you know, I investigated this and I
5 looked at the video tape on this date, but I'm aware
6 that there is or there was. I don't know if there
7 still is. There is video cameras inside, outside and
8 that it wouldn't be, you know, out of our regular
9 operation as a patrol when we're investigating a crime
10 to ask if there's video surveillance and maybe review
11 it. So it's possible that I did at some point in time
12 look at a video, but I can't remember a specific case.
13 I don't know if I investigated a fight there or a purse
14 being stolen off of the bar stool. And so they would
15 try to show us the video of the suspect that took the
16 property. So it's possible I did look at the video,
17 but I can't remember a specific incident to share with
18 you.

19 Q. All right. So you've testified that
20 Fogarty ran. And what, if anything, did you do at
21 that point?

22 A. I pursued him.

23 Q. Did you have to -- did you have to do

1 anything with Miss Fogarty before you pursued Mr.
2 Fogarty?

3 A. When I was trying to arrest Mr. Fogarty,
4 Mrs. Fogarty interjected and physically attacked me.
5 So I, you know, had to separate myself between Mrs.
6 Fogarty -- separate myself from Mrs. Fogarty. So I
7 pushed her away. At that point he started to run. I
8 turned my attention to Mr. Fogarty and pursued him down
9 the alley.

10 Q. Okay. And what alley did you pursue him
11 down?

12 A. Franklin Street alley.

13 Q. Okay. And can you estimate how far ahead
14 of you he was as you were running after him?

15 MR. BAILEY: Object to the form.

16 You can answer.

17 A. You know, I would say my best guess of a
18 distance, maybe two to three car lengths or similar to
19 that. 40, 50 feet, something like that.

20 Q. At any point in time did you lose sight of
21 him?

22 A. Yes. At the end of the alley he started to
23 turn west on State Street and, you know, from my point

1 of view made a right turn back west on State Street.
2 He was traveling south and I lost view of him as he
3 made that turn. The alley way being narrow, I lost
4 view of him.

5 Q. On the day that you were running down the
6 alley behind Mr. Fogarty -- on the night that you were
7 running down the alley behind Mr. Fogarty, do you
8 remember what type of lighting there was in the alley,
9 if any?

10 A. The way I remember it it was, you know,
11 somewhat lit, somewhat dark. Some businesses in that
12 alley would maybe have a light on and then there'd be a
13 10 or 15 foot span that didn't have a light on. So I
14 would say it's mixed between. I would describe it as
15 partially lit.

16 Q. Did you observe Mr. Fogarty make any
17 movements with his hands into any pockets while he was
18 running?

19 A. He did have -- he ultimately had something
20 in his hand, yes. I don't know if he went into his
21 pocket. I can't say specifically where he ended up
22 getting something in his hand but --

23 Q. Do you remember seeing something in his

1 hand when you were running down the alley?

2 A. That doesn't stand out in my mind. I mean,
3 I was focused in on him. But I don't, you know. I
4 can't specifically tell you that.

5 Q. All right. So there came a point in time
6 where you lost sight of Mr. Fogarty. Can you tell me
7 at what point you observed him again?

8 A. It was on State Street. When he had made
9 the right turn and when I came out of the alley to make
10 that turn, that's when I saw. That when he came back
11 into my view. And, you know, I observed him with
12 another officer and that officer was struggling with
13 Mr. Fogarty.

14 Q. And what officer did you observe? I'm
15 sorry. Who did you observe Mr. Fogarty with? Which
16 officer?

17 A. Canine Officer Smith.

18 Q. Okay. And when you say you observed a
19 struggle, can you be more specific?

20 A. From my perspective when I exited the alley
21 I specifically saw Mr. Fogarty resisting arrest.
22 Physically, you know, moving around and resisting
23 Officer Smith who was trying to place Mr. Fogarty, you

1 know, under arrest in custody.

2 Q. When you observed Mr. Fogarty struggling
3 was he struggling on the street or sidewalk, or was he
4 struggling while standing up?

5 A. He was on the ground in a position of, like,
6 all fours meaning his feet were on the ground. The
7 balls of his feet maybe on the ground. His hands on
8 the ground and he was trying to get back up as Officer
9 Smith was trying to, presumably, put him back down to
10 the ground and in handcuffs.

11 Q. Did you hear either of them say anything
12 as you were approaching them?

13 A. Yeah. Officer Smith was telling him to get
14 on the ground and put your hands behind your back or
15 similar to that nature. Specifically what he said, I
16 don't remember the exact words verbatim. But we were
17 both saying that. I said, put your hands behind your
18 back and you're under arrest, and that was being
19 uttered by Officer Smith as well.

20 Q. Did you hear Mr. Fogarty saying anything
21 at that point in time?

22 A. He was yelling and carrying on but I don't
23 -- like, the context of what he was saying, again he

1 didn't want to be arrested. He wanted to get away.

2 Q. So you observed Mr. Fogarty on all fours
3 as you said, right? You said his hands were on the
4 ground and his feet were on the ground?

5 A. Correct. When I said, yeah, in that
6 fashion, you know, moving around.

7 Q. Okay. What do you mean "moving around,"
8 as you remember it?

9 A. Moving around as opposed -- so maybe this
10 could be better described, as opposed to what you just
11 said on all fours meaning he's static and not moving.
12 He was kinetic and he was physically moving his
13 extremities, specifically his arms. He was trying to
14 regain his balance and pull away from Officer Smith's
15 grip. He was moving his legs to reposition himself and
16 his hands. That's how I would describe someone as
17 moving.

18 Q. Okay. So there came a point where -- all
19 right. You see Mr. Fogarty struggling with Officer
20 Smith. What did you do next?

21 A. I approached and tried to assist.

22 Q. How did you try to assist?

23 A. I tried to initially go hands on with my

1 left hand and push him back down to the ground.

2 Q. With -- what part of his body? What part
3 of Mr. Fogarty's body did you have with your left
4 hand, do you remember?

5 A. I would say the back right shoulder area,
6 you know, upper torso area.

7 Q. Okay.

8 A. Specifically I don't remember where my hand
9 went to, but that was where I was trying to push him
10 down, in the upper torso area.

11 Q. Okay. What happened next?

12 A. He continued to physically resist. Wouldn't
13 put his hands behind his back. And so at that point I
14 had, I was bent over and I had my night stick in my
15 hand, and I delivered two baton strikes with my baton
16 to Mr. Fogarty's upper torso/shoulder area.

17 Q. And why did you do that?

18 A. Mr. Fogarty was just involved in an
19 altercation where he attacked an innocent civilian. He
20 attacked his wife. And in the process of being,
21 attempting to be arrested for that, he attacked a
22 uniformed police officer. He then fled on foot. After
23 foot pursuit and I briefly lost sight of him, I see him

1 struggling with another uniformed police officer next
2 to a parked patrol car. Mr. Fogarty was not compliant.
3 He was being violent towards others. He was being
4 violent towards the police. And specifically in that
5 moment he was acting in an aggressive and physical
6 resistance to our arrest. So as to our training, I
7 used a baton to strike Mr. Fogarty ultimately to subdue
8 him so that we could stop the escalation of resistance
9 and put him in handcuffs.

10 Q. Why did you pick that location?

11 A. What location?

12 Q. On his back? Was there a specific
13 location where you struck Mr. Fogarty with the baton,
14 right?

15 A. Correct.

16 Q. You said it was on his back?

17 A. I did not, no. Where I intended to strike
18 Mr. Fogarty was the upper shoulder, upper arm and
19 shoulder area on his right side, I believe.

20 Q. Did your baton have any contact with his
21 upper shoulder area?

22 A. Yes.

23 Q. Why were you focused on hitting him in

1 that area? Is there a reason?

2 A. We're trained to -- we're trained in the use
3 of the baton and where to strike the baton in those
4 exact circumstances. And based on the training it's
5 the meatiest part of a person's body. And when I hit
6 somebody there it's safe to say that it could cause
7 some pain ultimately to gain compliance.

8 Q. When you said it was training, was it from
9 a directive from the City of Troy Police Department or
10 was it training from some other means?

11 A. I attended the law enforcement academy, Zone
12 Five Regional Law Enforcement Academy, for six months.
13 Part of that training was training in the use of
14 physical force and the use of a baton. So I received
15 training there. I receive training subsequently every
16 year in the City of Troy. Once a year we have
17 in-service training where we refresh, so to speak, in
18 terms of training. And those specific categories in
19 terms of force and use of the baton are covered every
20 year.

21 Q. To your knowledge does the City of Troy
22 Police Department have a directive regarding use of
23 force with the baton?

1 A. They do.

2 Q. And is that directive accessible to you?
3 Like if you wanted to look at it, could you look at
4 it?

5 A. Sure.

6 Q. How would you go about looking at it?

7 A. It's located on a computer.

8 Q. You can log into a computer and review the
9 directive?

10 A. Correct.

11 Q. Now, earlier you testified that Mr.
12 Fogarty attacked a uniformed police officer. Who did
13 he attack?

14 A. Myself.

15 Q. Okay. So you're referring to when you
16 testified that he elbowed you in the face?

17 A. Correct.

18 Q. When he elbowed you in the face, were you
19 face to face with him or were you facing his back?

20 A. I was sort of, I was facing his back.

21 (Officer Smith left the deposition
22 room.)

23 Q. And where in the face did he hit you with

1 his elbow?

2 A. My mouth.

3 Q. Okay.

4 A. My lips and mouth.

5 Q. Okay. Did you observe Mr. Fogarty strike
6 Officer Smith?

7 A. No.

8 Q. Okay. Did observe Mr. Fogarty try to
9 strike or attempt to strike Officer Smith?

10 A. My observations when I came around the
11 corner from the alley was Office Smith struggling with
12 Mr. Fogarty. What his intentions were, I don't know.

13 Q. But did you observe Mr. Fogarty, you know,
14 swing and miss at Officer Smith?

15 A. That I did not see.

16 Q. Did you see Mr. Fogarty try to kick but
17 miss Officer Smith?

18 A. Mr. Fogarty's legs were aggressively moving
19 around. And so it's fair to say that I don't know if
20 he was trying to just regain his balance or trying to
21 kick at Officer Smith.

22 Q. But it's your testimony that when you
23 observed Mr. Fogarty with Officer Smith, Mr. Fogarty

1 was trying to run away?

2 A. Mr. Fogarty -- my testimony was not simply
3 that he was running away. Again, my testimony was that
4 Mr. Fogarty was in an aggressive manner moving his
5 legs, moving his arms, trying to pull away from Officer
6 Smith, trying to get back up to his feet to turn and
7 face towards Officer Smith as opposed to lying face
8 down on the ground and simply complying with verbal
9 orders that we were giving him.

10 Q. If we could back up for a moment -- when
11 you got out of your patrol car and you were
12 approaching Mr. Fogarty, did the two of you make eye
13 contact at any point?

14 A. I don't remember that.

15 Q. When you approached him -- were you facing
16 each other when you approached him?

17 A. I had a conversation with Mr. Fogarty. I
18 addressed him. I spoke to him. So yeah, at some point
19 I did. We were facing each other, sure.

20 Q. Okay. And that was -- was that before or
21 after you told him that he was under arrest?

22 A. No, I tried to speak to him before he,
23 before he, you know, struck Sarah Fogarty. So I tried

1 to address his behavior before I tried to place him
2 under arrest. Sure.

3 (Officer Smith re-entered the
4 deposition room.)

5 Q. So you were talking to Mr. Fogarty before
6 he struck Miss Fogarty?

7 A. Yes.

8 Q. Okay. So is it your testimony that Mr.
9 Fogarty struck Miss Fogarty more than once?

10 A. Yes.

11 Q. Okay. Where were you the first time that
12 you observed Mr. Fogarty strike Miss Fogarty?

13 A. I was in the same exact spot that I -- I was
14 parked. I was sitting in my patrol car observing
15 exactly the way I just testified. I wasn't in a
16 different location. Is that what you were asking?

17 Q. You were in your patrol car?

18 A. Yes.

19 Q. And you got out of your patrol car and you
20 walked toward Mr. Fogarty, right?

21 A. Yes.

22 Q. And you said that you spoke to Mr.
23 Fogarty, right?

1 A. I remember addressing -- I believe what I
2 said and testified a while ago was I addressed Mr.
3 Fogarty, Mrs. Fogarty, and there was some other
4 subjects that were on the sidewalk. I had some type of
5 a conversation with them.

6 Q. And, I mean, look. I'm not trying to
7 confuse you. I'm trying to understand the sequence of
8 events. So if I say something that's about what you
9 testified to and it's incorrect, please say something
10 to me. Okay?

11 A. Sure.

12 Q. So you're addressing Mr. Fogarty among
13 other people. And is it your testimony that Mr.
14 Fogarty then again struck Miss Fogarty?

15 A. The sequence of events are, the short answer
16 would be, yes. The sequence of events are he has a
17 physical altercation with, Mr. Fogarty and Mrs. Fogarty
18 having a physical altercation, pushing, shoving,
19 involved in some type of disagreement.

20 Q. And you're in the car for that?

21 A. Correct. Draws my attention. Exactly when
22 I get out of the car, I don't know. That initially
23 draws my attention. He then has a physical altercation

1 with another male on the sidewalk and then an addition
2 altercation occurs between Mrs. Fogarty and Mrs.
3 Fogarty when he strikes her for no apparent reason or
4 just, you know, attacks her. And that's when I then
5 decide to place him under arrest and attempted to place
6 him under arrest.

7 MR. BAILEY: If I could just, I
8 think you said between Mrs. Fogarty
9 and Mrs. Fogarty. Did you mean Mrs.
10 Fogarty and Mr. Fogarty?

11 THE WITNESS: Correct.

12 MR. BAILEY: Why don't you read
13 his answer back just so he
14 understands?

15 (The last answer was read by the
16 reporter.)

17 MR. BAILEY: I just wanted it to
18 be clear. Mrs. Fogarty wasn't
19 fighting with Mrs. Fogarty?

20 THE WITNESS: Correct, Mr. and
21 Mrs. Fogarty were fighting.

22 Q. So you see a second -- is it fair to say
23 you see a second altercation between Mrs. Fogarty and

1 Mr. Fogarty?

2 A. Correct.

3 Q. You were out of your patrol car when you
4 observed that?

5 A. To the best of my knowledge I believe I was
6 out of the patrol car at that time.

7 (Mr. Morrissey exited the
8 deposition room.)

9 Q. What kind of physical contact did you
10 observe Mr. Fogarty having with Mrs. Fogarty?

11 A. He punched her or slapped her in the face or
12 upper torso.

13 Q. And you had already made your presence
14 known before he did that?

15 A. Correct.

16 Q. So it's your testimony that he did that
17 right in front of a police officer?

18 A. Yes, he did.

19 Q. Okay. So we'll move forward again, back
20 to when Officer Smith was present.

21 A. Yes.

22 Q. You said that you decided to take two
23 strikes or you decided to strike the shoulder with the

1 baton to subdue Mr. Fogarty, right?

2 A. Correct.

3 Q. So what happens? What happened next?

4 A. I delivered two baton strikes to his upper
5 shoulder area, to Mr. Fogarty's upper shoulder area,
6 while he was physically fighting with Officer Smith and
7 I.

8 Q. Let me stop you there. When you say
9 "physically fighting," again it's not your testimony
10 that he was striking either of you two at that time?
11 It's your testimony that he was resisting meaning that
12 he wasn't listening to your commands to put his hands
13 behind his back, right?

14 A. In addition to what you just said, he was
15 also physically resisting by -- he did not, I did not
16 observe him strike Officer Smith. But he was
17 physically resisting and moving his arms, kicking his
18 legs, trying to get back up, trying to turn and facing
19 and present himself in a manner that was non-compliant
20 and violent and tumultuous behavior. He wasn't just
21 simply, as you stated, not listening to the verbal
22 commands. He was doing more than that. He was
23 physically resisting arrest.

1 Q. I understand. But I just want to make
2 clear that you're testimony is not that he was
3 intentionally trying to strike or hit or, you know,
4 combat either you or Officer Smith?

5 MR. BAILEY: I object to the form.
6 The answer speaks for itself. But to
7 the extent you can answer that, go
8 ahead.

9 A. It's hard to understand what his intentions
10 were. I mean, as you just stated, he struck a female
11 right in front of a police officer. So what his
12 intentions were, I don't know. I did not, from my
13 perspective and point of view, see him strike Officer
14 Smith. But was it his intention to do that to get
15 away? That's a possibility. I simply don't know what
16 his intentions were.

17 Q. All right. So what happened next?

18 A. I delivered two baton strikes in rapid
19 succession from within close proximity to Mr. Fogarty's
20 right shoulder, upper torso. After the baton strikes,
21 Mr. Fogarty started to comply meaning that he stopped
22 physically trying to get away, flailing his arms,
23 kicking his feet, pulling away from Officer Smith and

1 I, acting violent. After the baton strikes, just laid
2 there with his arms underneath his torso. Myself and
3 Officer Smith physically pulled his hands out from
4 underneath him and placed handcuffs on him.

5 Q. Okay. Now, to the best of your knowledge
6 did both baton strikes hit his shoulder?

7 A. Yes.

8 Q. Okay. Did you observe -- you testified to
9 the fact that after you issued baton strikes either
10 you or Officer Smith were able to place Mr. Fogarty in
11 handcuffs, correct?

12 A. Yes.

13 Q. Prior to having Mr. Fogarty placed in
14 handcuffs did you notice any injuries to his head?

15 A. I didn't notice any injuries at all to, no,
16 to Mr. Fogarty.

17 Q. All right. Did you have any other
18 physical contact with Mr. Fogarty after he was in
19 handcuffs?

20 A. No.

21 Q. Okay. Do you remember whether it was you
22 or Officer Smith or both of you who lifted Mr. Fogarty
23 from the ground?

1 A. I don't remember who, who lifted him off the
2 ground.

3 Q. Do you remember into -- do you remember
4 whether or not Mr. Fogarty was placed in a patrol car?

5 A. I have knowledge he was ultimately. That's
6 how he got back to the police station. I didn't see
7 anybody put him in back of a car. I didn't lift him
8 off the ground. I don't know who did.

9 Q. Would it be fair to say you did not drive
10 or transport Mr. Fogarty to the police station?

11 A. Correct.

12 Q. Okay. Did you issue more than two baton
13 strikes?

14 A. No.

15 Q. Okay. As you sit here today are you aware
16 of whether or not one of the baton strikes hit Mr.
17 Fogarty in the head?

18 (Mr. Morrissey re-entered the
19 deposition room.)

20 A. I believe that the second baton strike quite
21 possibly could have struck him in the top of the head,
22 yes.

23 Q. Now, did there come a time where you

1 learned Mr. Fogarty suffered an injury to his head?

2 A. Yes. Some, you know, few minutes after he
3 was placed into custody and was basically laying on the
4 ground under arrest, there was blood that we, that
5 became visible from the top of his head.

6 Q. Did you observe blood on the ground or
7 just on his head?

8 A. Just on his head from what I can remember.

9 Q. Where was Mr. Fogarty when you noticed
10 that there was blood on his head?

11 A. He was lying on the pavement where he was
12 placed in custody.

13 Q. Okay. So you noticed the blood before he
14 was placed into a patrol car?

15 A. Correct.

16 Q. Okay. Now, when you say you noticed the
17 blood, did you just notice if it was blood on his head
18 or was it dripping down?

19 A. There was blood, you know, coming from his
20 hair on his head dripping, starting to drip down on his
21 forehead.

22 Q. Okay. Do you have reason to believe that
23 he suffered that injury prior to the issuance of your

1 baton strikes?

2 A. I don't have reasonable belief of that, but
3 it's certainly possible that he could have been injured
4 in the altercation that he had with the police, you
5 know, when he fell to the ground or when he was
6 fighting, yes.

7 Q. Meaning when he fell to the ground when?
8 When he was with you in front of Bootlegger's or when
9 he was with Officer Smith?

10 A. I guess it's possible it could have happened
11 both times, but I didn't see him go to the ground
12 initially when he was with Officer Smith.

13 Q. Did you see him -- I mean, when you were
14 standing in front of Bootlegger's with him, and I know
15 you testified that I think, you know, at least his
16 knee or leg or hand went to the ground. I mean, did
17 you see him hit his head?

18 A. No, I didn't.

19 Q. Would it be fair to say you were watching
20 him for officer safety?

21 A. I mean, sure.

22 Q. You were keeping your eyes on him because
23 you wanted to place him into custody, right?

1 A. Correct.

2 Q. So if he is struggling with you, you're
3 paying attention to him, right?

4 A. I am.

5 Q. Is it fair to say you would have seen him
6 hit his head if he hit his head at this point?

7 MR. BAILEY: Object to the form.

8 A. I did not see him hit his head when I was
9 trying to place him under arrest.

10 Q. Again, did you have any physical contact
11 with his head when you were with him outside of
12 Bootlegger's?

13 A. No, not that I remember.

14 Q. All right. And I think you testified that
15 you didn't strike him in front of Bootlegger's, right?

16 A. Absolutely not.

17 Q. And when he was running down the alley you
18 didn't see Mr. Fogarty fall, right?

19 A. Correct.

20 Q. All right. And I know you lost sight of
21 him. But when you saw him again you didn't see him
22 fall on his head at that point, right?

23 A. I did not see that, no.

1 Q. And you didn't see Officer Smith strike
2 him, right?

3 A. Correct.

4 Q. Okay. And when you were interacting with
5 Mr. Fogarty at Bootlegger's you didn't see any blood
6 on his head, right?

7 A. Correct.

8 Q. And you didn't observe anybody hitting him
9 in the head, right?

10 A. He was involved in a, you know, in a
11 disagreement pushing and shoving. It's possible he
12 got, you know, pushed or punched in the face or head
13 but I didn't see an injury then, you know, in front of
14 Bootlegger's.

15 Q. Okay. So Mr. Fogarty gets placed in a
16 patrol car. You have nothing to do with that, right?
17 You didn't put him in the patrol car?

18 A. I did not put him in the patrol car.

19 Q. After there came a point where Mr. Fogarty
20 was removed from, you know, where you were standing.
21 What did you do next?

22 A. I remember walking back where my patrol car
23 was initially parked in front of Bootlegger's and

1 Broadway and either continuing the investigation there,
2 meaning like try to get information on witnesses or
3 interview possible victims like the citizen that was
4 attacked by Mr. Fogarty. Ultimately I returned to the
5 station to process Mr. Fogarty's arrest and Mrs.
6 Fogarty. She was ultimately arrested as well and
7 brought back to the station.

8 Q. Do you know who made that arrest?

9 A. I don't remember who in terms of making that
10 arrest. I assume you mean like --

11 Q. Physically putting handcuffs, yeah.

12 A. That I don't remember. At this point now
13 there's several officer in the area and I don't
14 remember who physically put handcuffs.

15 Q. Is it fair say that nobody else ran after
16 you when you were running after Mr. Fogarty? Do you
17 remember anybody running behind you?

18 A. No. I was focused on Mr. Fogarty. I don't
19 remember anybody running behind me.

20 Q. Okay. All right. Can you describe what
21 type of material the baton is made out of that you
22 had, if you know?

23 A. Wood.

1 Q. It's wood?

2 A. Yeah. And then specifically I don't know,
3 but wood.

4 Q. Can you describe the dimensions of it?

5 A. Not with any specificity but I would imagine
6 30 inches or so in length. Maybe more, maybe less by a
7 few inches. Maybe, you know, maybe a couple pounds.
8 Maybe a pound. Maybe 16 ounces. Something to that
9 effect in weight.

10 Q. Is it hollow or is it solid?

11 A. It's solid wood, I believe.

12 Q. So it looks like -- I'm not staying this
13 is what it is -- but it looks like one of those old
14 baseball bats that you get as a souvenir? It's solid
15 like that?

16 MR. BAILEY: Object to the form.

17 You can answer.

18 A. Sure. It's, you know, it's a stick. It's a
19 round -- I'm trying to describe it for you best I can.
20 It's a round stick approximately 30 inches long. I
21 mean, it's the same thickness the whole length, just
22 about.

23 Q. Okay. And I mean, do you hold it at the

1 bottom like a bat if you're using it?

2 A. There's multiple ways to grip it in
3 different applications. But specifically to this, I
4 held it not necessarily on the bottom but sort of
5 choked up further but, you know, the bottom half of it.
6 I guess you would say, the bottom portion of the baton.

7 Q. Would it be fair to say over the course of
8 your training in the use of the baton, they teach you
9 different methods to use it?

10 A. They do, yes.

11 Q. And they teach you, depending on what
12 method you're using it for, you have to hold it in a
13 different way?

14 A. Correct.

15 Q. Are there any written training materials
16 regarding use of the baton that you're aware of?

17 A. There is, yeah. There has been, yeah.

18 Q. Do you have any of them?

19 A. I don't physically have them right now.

20 Q. Now would be right now. But do you have
21 access? If you wanted to go look at those training
22 materials, can you do so when you leave here?

23 A. I haven't done that. You know, in the

1 academy, I would assume the academy had some type of
2 written material. It's more of a practical training,
3 you know, practical scenario type training where, you
4 know, you're -- not necessarily a written document.
5 But I guess there is possibly a written document
6 somewhere.

7 Q. The City of Troy Police Department, have
8 they ever given you written materials regarding the
9 use of a baton?

10 A. It's possible. I don't remember, you know,
11 specifically being handed a material on how to use a
12 baton. But our in-service training that happens
13 yearly, we go over baton strikes and it's possible
14 there was a pamphlet or the instructor at that time
15 prepared a written document and issued it to the
16 officers that attended the class.

17 Q. All right. At any point in time did you
18 sustain any injuries?

19 A. I remember my lips. I had, like, a fat lip
20 from being elbowed. But physical injury by the
21 definition of penal law, no.

22 Q. Did anyone, any officer, take photographs
23 of the injury to your lip?

1 A. I don't remember if they did or they didn't
2 that day or that night, I mean.

3 Q. Okay. Do you remember receiving any
4 medical attention?

5 A. I did not.

6 Q. Do you remember Officer Brian Strock being
7 present at any point in time?

8 A. Yes.

9 Q. At what point did he arrive?

10 A. After Mr. Fogarty was placed into custody.

11 Q. All right. So he didn't say anything to
12 you to effect of, I saw what happened? I mean, do you
13 know whether or not he saw Mr. Fogarty before he got,
14 he was placed in handcuffs?

15 A. I'm just trying to understand. Do I know if
16 Brian Strock saw Fogarty before he was ever arrested?

17 Q. Based upon any conversations you had with
18 him?

19 A. I don't know. No, I don't know that.

20 Q. He didn't come over to you at any point in
21 time and say, I saw what happened?

22 A. No.

23 Q. That's all I wanted to know. Did you have

1 any physical contact with Mr. Fogarty's phone, cell
2 phone?

3 A. During the process of removing his hands out
4 from underneath his torso, he was holding his phone,
5 you know, a phone in his hand. And I removed it from
6 his hand and set it to the side and placed, continued
7 or finished putting the handcuffs on him.

8 Q. That was after you issued the baton
9 strikes?

10 A. Yes.

11 Q. Did you kick his phone?

12 A. No.

13 Q. Were you interviewed by Internal Affairs
14 regarding this case?

15 A. Yes.

16 Q. Do you remember how many times they
17 interviewed you?

18 A. It was at least twice, at least two times.

19 Q. Do you know why they interviewed you
20 twice?

21 A. I don't know what the intentions were,
22 whether or not it was, they were following up or there
23 was a malfunction with a tape recorder or what. I

1 don't know why they did it twice.

2 Q. Okay. What is your understanding of the
3 conclusion of their investigation?

4 A. I don't understand the conclusion of their
5 investigation.

6 Q. Do you know what -- as you sit here today
7 do you know what their official determination was?

8 MR. BAILEY: Object to the form.

9 You can answer.

10 A. I know what at the time Terry Buchanan, the
11 captain at the police department, I know what his
12 opinion of the situation is.

13 Q. And what is that?

14 A. Based on his report that I had the
15 opportunity to look at was that his opinion is I used
16 excessive force.

17 Q. Prior to preparing for today's deposition
18 had you ever had the opportunity to review that report
19 before?

20 A. No.

21 Q. I mean, did they notify you in anyway that
22 they determined that the force was excessive?

23 MR. BAILEY: Object to the form.

1 You can answer.

2 A. There was a piece of paper, memo maybe form
3 or maybe in the format of a letter from, at the time,
4 Commissioner Magnetto, that in summary had what Terry
5 Buchanan's opinion was and indicated that his opinion
6 was that I used excessive force. In addition to that
7 there was a letter that the Chief of Police, John
8 Tedesco, wrote to Mr. Fogarty and cc-ed me a copy of it
9 explaining in there that I used excessive force.

10 Q. Was any disciplinary action taken as a
11 result of Captain Buchanan's determination?

12 A. No.

13 Q. How soon after the interview, the final
14 interview with Internal Affairs, did you learn what
15 Captain Buchanan's opinion was?

16 A. How soon like in terms of days or weeks
17 or --

18 Q. Whatever, whatever you can do.

19 A. Honestly, I don't remember. I mean, it
20 might have been a month. I'd be guessing. I really
21 don't remember when they did. It's certainly, you
22 know, that can be found out. That can be researched.
23 There's a date on the letter. There's a date of the

1 incident. So we can certainly get that figured out for
2 you, but I don't remember right now.

3 Q. Did anybody meet with you after your final
4 interview to discuss Captain Buchanan's determination?

5 A. In terms of meet with me, the only thing
6 that happened was I was given a copy of the summary of
7 Mr. Buchanan's opinion by Commissioner Magnetto at the
8 time he issued it. I signed it, that I received a copy
9 of it, and that was that.

10 Q. No face to face conversation about the
11 determination?

12 A. There was face to face contact.
13 Commissioner Magnetto was certainly there. He didn't
14 just leave it in a room and leave and come back. He
15 handed it to me. Turned it around on the table. Slid
16 it over to me. I looked at it. I signed that I
17 received a copy. I took that copy, tried to inquire
18 then what it was all about and Mr. Magnetto, or
19 correction, Commissioner Magnetto said that he
20 couldn't, he couldn't discuss it with me at the time.

21 Q. Did anybody discuss it with you
22 afterwards?

23 A. Afterwards?

1 Q. Yeah. Like after you go to -- you do this
2 interview with Internal Affairs, and then they give
3 you this determination that you used excessive force.
4 Did anybody discuss it with you about why they decided
5 that way or what you should do differently?

6 A. By anybody do you mean, like, official
7 capacity or in general conversation?

8 Q. Anybody with the City of Troy Police
9 Department?

10 A. There's, you know, a lot of people will ask.
11 Co-workers would ask, hey, whatever happened with that?

12 Q. I mean, what about anybody with authority?
13 Did anybody sit down with you and explain to you why
14 they made the determination they made?

15 A. No. Other than those documents that I was
16 issued, nobody talked to me.

17 Q. I mean, did you try to talk to anybody to
18 find out why they made that determination?

19 MR. BAILEY: Object to the form.

20 He just said he tried to talk to
21 Magnetto and Magnetto wouldn't talk to
22 him.

23 Q. Besides the commissioner, did you try to

1 talk to anybody else with authority as to why they
2 made the determination they made?

3 A. It was pretty clear that I didn't have an
4 opportunity to discuss the incident. I was obviously
5 in disagreement of one person's opinion, that being
6 Terry Buchanan. He made a mistake in his report. So I
7 was in disagreement with that and would have liked an
8 opportunity to be able to speak to somebody about it.
9 But it was pretty clear by Commissioner Magnetto that I
10 wasn't allowed to.

11 Q. So as far as you know there was no way you
12 could appeal that determination?

13 MR. BAILEY: Object to the form.

14 A. There was. I believe that there's a process
15 in how you will can appeal it. I know of the PBA
16 President Fitzgerald, PBA President -- he retired. PBA
17 President Tommy Hoffman. He retired. PBA President
18 Aaron Collington. He, all three of those PBA
19 presidents. Ian Silverman, who at the time was the
20 corporation counsel. Mayor Rosamilla, who at the time
21 was the mayor, they met with -- this is what I was made
22 aware of. They met with the Chief of Police, John
23 Tedesco, to try to explain to him that this wasn't

1 excessive force and that Terry Buchanan made a mistake,
2 and that the correct outcome of the investigation, you
3 know, should be talked about or at least discovered
4 here.

5 Q. When you say made a mistake, do you mean
6 there was something factual in the report was wrong,
7 or do you mean that the determination as a whole was a
8 mistake?

9 A. Both.

10 Q. All right. So with the first, factually,
11 what is it that you allege was a mistake?

12 A. In Mr. Buchanan's report he has that I
13 struck Mr. Fogarty several times with a baton. He
14 wrote that.

15 Q. And that's not factually correct?

16 A. That's incorrect.

17 Q. But it would be factually, I mean, you
18 don't contest you struck him twice with the baton,
19 right?

20 A. I struck Mr. Fogarty exactly twice, yes.

21 Q. Are there any other -- in your opinion,
22 are there any other factual errors with this, with the
23 captain's investigation?

1 MR. BAILEY: Object to the form.

2 You can answer.

3 A. I briefly had a minute to look over it.
4 Other than that which stood out to me and the outcome,
5 which is what his opinion is -- it's an opinion based
6 report not a factually based report -- they were wrong
7 both factually and opinion based.

8 Q. Have you ever had a -- has it been
9 determined that you violated the Code of Conduct in
10 the past?

11 MR. BAILEY: You mean in another
12 unrelated incident?

13 MR. CALABRESE: Right.

14 Q. So we have one here. I mean prior to
15 that?

16 A. What do you mean, "we have one"?

17 Q. Meaning the determination by the captain
18 here. So he's saying that there was excessive force
19 used and so that's a violation of the Code of Conduct.
20 Were there any prior determinations made in your
21 capacity of the City of Troy Police Department where
22 somebody from the department said you violated the
23 Code of Conduct?

1 MR. BAILEY: I do object to the
2 form. His personnel file was given to
3 the federal magistrate. It was
4 reviewed and whatever the magistrate
5 gave to you from his personnel file is
6 fair questioning.

7 MR. CALABRESE: Right.

8 MR. BAILEY: Okay. I do not think
9 it is fair questioning to question him
10 about things that the federal court
11 did not disclose to you.

12 MR. CALABRESE: Well, they did
13 disclose --

14 MR. BAILEY: And if you want to
15 ask him about what was disclosed, I'm
16 sure that the Federal Judge disclosed
17 a matter to you, and I have no problem
18 if you question him about that which
19 was disclosed.

20 Q. It's my understanding that there was a, it
21 was determined you violated the Code of Conduct with
22 regard to your interaction with Brian Houle?

23 A. I'd have to -- I'd like to review the

1 document that was in my personnel file in regards to
2 Mr. Houle. My recollection of that is a counseling
3 memo, meaning that document, the counseling memo was
4 placed into my file and that I met with Captain Kehn
5 regarding my interaction with Mr. Houle and that
6 certain sections of the Code of Conduct were discussed.
7 I don't know if the verbiage on that is that I violated
8 those certain sections. I believe that it was, I was
9 re-made aware of, so to speak.

10 Q. And I'm sorry. What was Kehn's title
11 then?

12 MR. BAILEY: Captain.

13 A. He's a captain.

14 Q. What did Captain Kehn discuss with you
15 with regards to this incident, with regard to the
16 Brian Houle incident?

17 A. That discussion is on that document. It's
18 in context. It's all right -- it's a question and
19 answer and what was discussed is right on the document.

20 Q. As we sit here today, though, can you tell
21 me what it is the two of you talked about?

22 A. It was something to the -- I don't
23 specifically remember the different Codes of Conduct.

1 It was something about impartiality, you know, as that
2 pertains to the code of conduct. But the section, I
3 don't remember.

4 Q. Is it fair to say there was no physical
5 contact between you and Brian Houle?

6 A. What do you mean?

7 MR. BAILEY: You mean use of
8 force?

9 Q. Right. Brian Houle did not make a
10 complaint against you regarding excessive force,
11 right?

12 A. It's possible that he did. I was never
13 found to be in violation of the Code of Conduct for
14 excessive force with Brian Houle both internally and --

15 Q. Right. Okay. So is it fair to say that
16 there was never a determination that you used
17 excessive force on Brian Houle?

18 A. Correct, I have never used excessive force
19 on Brian Houle.

20 Q. The matter that they discussed, that
21 Captain Kehn discussed with you, was separate from use
22 of force, right?

23 A. Correct.

1 Q. Okay. And I mean it's your testimony that
2 Captain Kehn sat down with you and discussed what it
3 is that he thought you did wrong, right?

4 A. No.

5 Q. So what did he discuss with you?

6 A. The context of that is going to be within
7 that document. I mean, is there a way to look at that
8 document? You can look at this document or I could
9 look at that document to provide an answer to you. If
10 I don't have that in front of me, I can't give you --

11 Q. Is it fair to say you don't remember?

12 A. No, that's not fair to say. What is fair to
13 say is I remember there being a document with questions
14 and answers. I sat down with Captain Kehn and it was,
15 the context of that conversation and document was to
16 show that I, that Captain Kehn handed me those sections
17 of Code of Conduct. I read them in front of him, and
18 it was documented that I re-reviewed or, in a sense,
19 retrained on those sections of Code of Conduct.

20 Q. Did they take any disciplinary action
21 against you for the interaction with Brian Houle?

22 MR. BAILEY: Object to the form of
23 the question. Again, if it was

1 disclosed as part of the personnel
2 file, then it's fair questioning. If
3 it wasn't disclosed --

4 MR. CALABRESE: Can we go off the
5 record?

6 (A short recess was taken.)

7 Q. Officer, were you disciplined in the Houle
8 matter?

9 A. No.

10 Q. And were you disciplined in the Fogarty
11 matter?

12 A. No.

13 Q. At any point in time did you speak with
14 Sergeant Carello regarding your interaction with Mr.
15 Fogarty?

16 A. Yes.

17 Q. Did Sergeant Carello arrive on scene that
18 night?

19 A. I believe he did. I believe he, at some
20 point in time, arrived on scene.

21 Q. Do you remember having a conversation with
22 Sergeant Carello back at the police station?

23 A. I don't specifically remember us talking.

1 Q. Would it be fair to say you told Sergeant
2 Carello that you were unsure as to how Mr. Fogarty
3 sustained his injuries?

4 A. It was -- yeah. It was, there was a
5 question as to whether that I specifically knew that I
6 caused that injury. So he, in the process of the
7 arrest we noticed that he was injured. So I documented
8 that he was injured and that I noticed it. The exact
9 cause of that injury I don't know. That, to the best
10 of my knowledge, was discussed with Sergeant Corello at
11 some point in time whether at the station, at the scene
12 or --

13 Q. Do you remember Officer Faby being
14 present?

15 A. I don't remember him ever being present.

16 Q. At the scene, right?

17 A. No, I don't remember him being there.

18 Q. Did Sergeant Carello assist you with
19 writing any of the reports that you wrote after you
20 returned to the station?

21 A. No.

22 Q. Okay. Did you have any other interaction
23 with Mr. Fogarty after he was handcuffed and placed

1 into a patrol car?

2 A. I processed the arrest. I booked him, yes.

3 Q. And after that did you have any
4 interaction with him?

5 A. You mean like in my personal life or --

6 Q. No. No. Did you have any interaction
7 with him at the courthouse for arraignment?

8 A. Not that I can remember. I don't remember
9 what the disposition of his criminal case was.

10 Q. Do you remember being called to any, do
11 you remember being asked to testify in regard to his
12 criminal case?

13 A. I don't remember if there was or wasn't.

14 Q. Do you remember discussing this case with
15 anybody from the Rensselaer County District Attorney's
16 Office?

17 A. I don't. I don't remember.

18 Q. I just have a couple of documents I would
19 like to go over. The first one was Plaintiff's
20 Exhibit 1. It was the incident report. Officer, are
21 you familiar with Plaintiff's Exhibit 1?

22 A. Yes.

23 Q. All right. It's the incident report,

1 correct?

2 A. Yes.

3 Q. And you were the reporting officer for
4 this incident report?

5 A. Correct.

6 Q. The first question is: On the side of the
7 report there are letters A through N?

8 A. Correct.

9 Q. On the first page?

10 A. Yes.

11 Q. And letter D you wrote "47"?

12 A. Correct.

13 Q. Could you tell me what the 47 stands for?

14 A. The best of my knowledge that stands for
15 where the location occurred and 47 is outside or
16 street.

17 Q. And after you wrote 01. Can you tell me
18 what that stands for?

19 A. I don't remember. There's a chart that we
20 look at that corresponds with these letter boxes and we
21 pick from the chart what's applicable and put it in the
22 box.

23 Q. Is this a chart that you have at the

1 police station that you can use?

2 A. Yes. It's a part of a DCJS form 3205.

3 MR. CALABRESE: I make a request
4 for that chart so I can better read
5 the incident report.

6 MR. BAILEY: So we don't lose
7 track, why don't you just print a
8 letter to me so we don't walk out of
9 here and forget about this.

10 Q. Officer, does the chart have a name?

11 A. It's -- this incident report is a state
12 report. It's a DCJS 3205 report, and that form is
13 available on the website or state form and it's all
14 part of that form.

15 Q. Okay.

16 A. It's just a chart that you can reference
17 when your filling it out.

18 Q. Officer, do you remember at what point in
19 time you wrote this report?

20 A. It would have been the same -- it would have
21 been that night, the report time.

22 Q. Did anybody assist you in writing this
23 report?

1 A. No.

2 Q. Okay. In the narrative portion which is
3 box 73, one of the statements made was A1, did sustain
4 an injury consisting of a laceration on the top of his
5 head. However it's unclear when the injury occurred.
6 Is there a reason you included that sentence in this
7 narrative?

8 A. Yes.

9 Q. And what is the reason?

10 A. It's documenting on an official document
11 that the subject, Mr. Fogarty, had an injury while we
12 were arresting him.

13 Q. Is there any reason why you used the term
14 "when" instead of "how" when you wrote it's unclear
15 when the injury occurred?

16 A. I mean, no. I didn't specifically. I don't
17 have a reason that I specifically chose that word as
18 opposed to another word. Maybe it's just because my
19 grammar's not good but --

20 Q. Okay. When you're writing this report,
21 was it unclear to you as to when the injury occurred?

22 A. Yes.

23 Q. Okay. Could you state the facts which

1 would lead you to believe that the injury occurred at
2 a time other than when you and Officer Smith were
3 trying to handcuff Mr. Fogarty?

4 A. You want me to state facts to support the
5 injury occurring at some other time?

6 Q. When you wrote this report did you think
7 it occurred at a time other than when you and Officer
8 Smith were trying to arrest Mr. Fogarty?

9 MR. BAILEY: I do object to the
10 form. I think he was asked and
11 answered that. I certainly will let
12 him answer it again, but I think
13 you're asking him to testify about
14 things me may not know.

15 For example, he may not know if he
16 got the injury outside Bootlegger's or
17 he may not know if he got it before he
18 rounded the corner. But I'll let you
19 ask away. I just, I want to be fair
20 to him with the questions. So go
21 ahead. Ask away.

22 Q. At the time that you wrote the report --
23 at the time that you wrote the report, when did you

1 think the injury occurred?

2 A. At the time I typed this report I didn't
3 know when it occurred exactly.

4 Q. At the time that you wrote this report how
5 did you think it occurred?

6 A. I don't. I don't know how it would have
7 occurred. I can't specifically say how it occurred.

8 Q. All right. Let me show you Plaintiff's
9 Exhibit 2. Officer, are you familiar with Plaintiff's
10 Exhibit 2?

11 A. Yes.

12 Q. It's a Troy Police Department
13 Control/Restraining report. Did you author this
14 document?

15 A. Did I alter it?

16 Q. Author it? Did you write it?

17 A. I'm sorry. Yes.

18 Q. Did anyone assist you with writing this
19 document?

20 A. No.

21 Q. Now, on page two of the report, sentence
22 N, you state, I noticed that the defendant was holding
23 an unknown black colored object in his hands. Once

1 the defendant was on the ground, his hands were under
2 his body concealing the unknown black object. Can you
3 tell me how the defendant was holding the unknown
4 black colored object in his hands?

5 A. Clenched in the grip of his hand.

6 Q. At the time that you wrote this report,
7 did you know that the unknown black colored object was
8 a cell phone?

9 A. Just give me one second.

10 MR. MORRISSEY: To clarify, are
11 you asking at the time he wrote the
12 report later on?

13 MR. CALABRESE: When he wrote this
14 report, yes.

15 A. Did I know it was what?

16 Q. When you wrote the report, when you were
17 typing the report, did you know that the unknown black
18 colored object that you observed was a cell phone?

19 A. Yes.

20 Q. Okay. Is there any reason you wrote
21 "unknown black colored object" instead of cell phone?

22 A. I wrote it where?

23 Q. In your report? I guess the question is:

1 How come you just didn't call it a cell phone in your
2 report?

3 A. The purpose of this report is to take a
4 kinetic in three D event that occurred very fast and
5 quickly over the course of maybe 45 seconds to a minute
6 and then try to put it in a two dimensional document on
7 the report. So it starts from the beginning. Tells a
8 story. Starts from the beginning and goes to the end.
9 The sentence where you pointed to, that was documenting
10 to the best that I could what I knew then. And then as
11 the report evolves and information is gathered, that's
12 when I pulled his hand out from underneath him. I
13 noticed it was a cell phone then.

14 Q. Okay. So it's your testimony that you did
15 not realize what was in his hand until you actually
16 pulled the object from his hands?

17 A. Yes.

18 Q. Okay. All right. Later on, if we go down
19 a couple more sentences, you write, due to the fact
20 that defendant was moving around and trying to prevent
21 officers from placing his hands behind his back, one
22 of the baton strikes inadvertently came into contact
23 with the defendant's head. Did anybody tell you to

1 put that in there?

2 A. No.

3 Q. All right. When, at what point in time
4 did you author this report?

5 MR. BAILEY: Asked and answered.

6 Go ahead.

7 A. The same night that the incident occurred.

8 Q. Which did you author first: The incident
9 report or use of force report?

10 A. I don't remember. I don't remember. They
11 were both done the same night. Which one was done
12 first, I don't remember.

13 Q. All right. Going back to Plaintiff's
14 Exhibit 1, the incident report, did anybody tell you
15 to put in there that it was unclear when the injury
16 occurred?

17 A. Did anybody tell me to specifically write
18 that, no.

19 Q. After you wrote either report, did anybody
20 review it and tell you to make any changes?

21 A. Two separate questions. The reports do get
22 reviewed but nobody told me to make a change from the
23 original report that I wrote.

1 Q. So these were your original reports?

2 A. Yes.

3 Q. All right. I'm going to show you
4 Plaintiff's Exhibit 3. Officer, are you familiar with
5 this report?

6 A. Yes.

7 Q. All right. Plaintiff's Exhibit 3 is a New
8 York State Domestic Incident Report. You wrote this
9 document?

10 A. Yes.

11 Q. Okay. On the first page -- let me ask
12 this: When did you write this document?

13 A. On the night of the incident.

14 Q. Okay. So it was at the same time
15 generally that you wrote the other two reports?

16 A. Correct.

17 Q. There's a box, if we go to the left hand
18 side you see on top dates and then below that, victim
19 party one. And below that suspect, party two?

20 A. Correct.

21 Q. For suspect party two you wrote Francis
22 Fogarty, correct?

23 A. Correct.

1 Q. And two boxes below the name there's a box
2 that says injured. Can you tell me why you wrote, no?

3 A. It appears as though the time of the
4 incident that this report, the domestic incident, that
5 documents the initial verbal argument between Sarah
6 Fogarty and Francis Fogarty and that initial argument,
7 and at that time I didn't notice any injury to Mr.
8 Fogarty.

9 Q. Just so I understand what you're saying,
10 you answered no or you filled in no because it was
11 your understanding Miss Fogarty didn't injure Mr.
12 Fogarty?

13 A. Correct.

14 Q. Okay. All right. So when filling this
15 out you weren't taking into consideration anything
16 that occurred after Mr. Fogarty and Miss Fogarty had
17 their confrontation?

18 A. This report documents the initial verbal
19 argument between the two then married subjects, yes.

20 Q. Okay. And if we go to page two, could you
21 tell me who wrote that?

22 A. Page two?

23 MR. BAILEY: You mean the

1 narrative?

2 Q. Could you tell me who wrote the narrative?

3 A. I wrote the narrative.

4 Q. And where did you get the information for
5 this narrative?

6 A. This narrative is what Sarah said at some
7 point in time to me.

8 Q. And if we look down below it says, there
9 is a line and it says, below the line, victim deponent
10 signature. Above it says, refused. Did you write
11 refused?

12 A. Yes.

13 Q. Why did you write refused?

14 A. Sarah Fogarty was not cooperative and did
15 not want to sign any statements against Francis
16 Fogarty. She didn't want to cooperate with the report.

17 Q. Was this information obtained from her at
18 the police station?

19 A. No. I believe this is, this information was
20 obtained on scene initially when they got in the verbal
21 argument and I initially approached them and had
22 conversations with them.

23 Q. Okay. So you received this information

1 from Miss Fogarty prior to telling Mr. Fogarty that he
2 was under arrest?

3 A. Yes.

4 Q. Okay. Did you obtain this information
5 from Miss Fogarty prior to witnessing a second
6 physical confrontation between Mr. Fogarty and Miss
7 Fogarty?

8 A. I don't remember specifically if that, if
9 that's the case.

10 Q. Was Mr. Fogarty present when you were
11 obtaining this information from Miss Fogarty?

12 A. They both were, yes.

13 Q. Okay. So you were speaking with Miss
14 Fogarty and Mr. Fogarty was -- withdraw that. Could
15 you estimate the time period between you exiting your
16 patrol car and Mr. Fogarty sort of running from you
17 down the alley, approximately?

18 A. I believe I already tried to give you my
19 best guess there. Like I said, it was probably between
20 the parameters of when I first started to arrest him
21 and leave and he resisted the arrest to when he started
22 running, and then it was all over maybe 30 seconds to a
23 minute and 45 seconds. And that's a complete guess.

1 Q. Did you speak to the citizen who got
2 punched in the face prior to telling Mr. Fogarty he
3 was under arrest?

4 A. Yes.

5 Q. Okay. What, if any, statements did he
6 make to you?

7 A. The exact words or context, I can't
8 remember. But I inquired with him whether or not he
9 wanted to pursue charges against Mr. Fogarty. To the
10 best of my knowledge he didn't want to.

11 Q. Was Mr. Fogarty present for that
12 conversation or you don't remember?

13 A. Present in what capacity?

14 Q. Was he standing next to you?

15 A. He was still in the immediate vicinity but I
16 don't know if he was standing right beside me.

17 Q. Would it be fair to say he wasn't
18 participating in the conversation?

19 A. Correct.

20 Q. I'm going to hand you Plaintiff's Exhibit
21 4 and my question is: Is this the letter you were
22 talking about earlier that officer, that Commissioner
23 Magnetto had you sign?

1 A. Well, it appears as though he would have
2 signed it. Maybe, maybe there's something else that I
3 signed that I received it. I don't see my signature on
4 this form. But this certainly is the letter or a copy
5 of what I was given, yes.

6 Q. Do you remember whether or not maybe you
7 signed below the commissioner's name?

8 A. It could be possible.

9 Q. Okay. Do you remember seeing this
10 document before?

11 A. I don't know. On the date that it was given
12 to me, yes.

13 MR. CALABRESE: I don't have any
14 further questions.

15 MR. BAILEY: Okay. I'm going to
16 have these copied.

17 MR. MORRISSEY: I'm going to have
18 some questions.

19 MR. BAILEY: All right.

20 **EXAMINATION BY MR. MORRISSEY:**

21 Q. I just want to clarify some points.
22 Officer Jones, my name is Richard Morrissey. We met
23 before. I'm the corporation counsel for the City of

1 Troy. I represent the city in this case. And at this
2 point I only represent the city. I believe you
3 testified that you struck the plaintiff twice with
4 your baton, is that correct?

5 A. Yes.

6 Q. Did you intend to inflict pain when you
7 struck him?

8 A. No.

9 Q. You did not intend to inflict pain? What
10 was the purpose of your baton strike?

11 A. My intention and the purpose for the baton
12 strikes was to gain compliance from Mr. Fogarty to stop
13 the escalation of physical resistance that he was
14 engaging in in order to ultimately prevent him from
15 further injury not only to himself, to the police, to
16 other citizens by placing him in custody.

17 Q. You would agree that a baton strike
18 inflicts pain, does it not?

19 A. I would agree that it does, yes.

20 Q. Okay. And what you were trying to do was
21 -- were you using a form of force that's called pain
22 compliance or something like that?

23 A. That seems to be a hot topic, the pain

1 compliance verbiage. Certainly when you are allowed to
2 use a baton and you deliver a baton strike, part of the
3 baton strike is that it's possible that it's going to
4 cause pain. And part of our training is when that pain
5 is caused, it distracts the person from continuing the
6 escalation of force and allows them to maybe rethink
7 their decision to physically, actively to physically
8 resist any further from that point and gives us an
9 opportunity to stop them from escalating and put them
10 into custody.

11 Q. Thank you for clarifying that. Did you
12 intend to injure him, meaning Mr. Fogarty?

13 A. No.

14 Q. Did you intend to lacerate his skin?

15 A. I did not.

16 Q. Did you intend to strike him in the head?

17 A. It was not my intention to strike him in the
18 head.

19 Q. Where did you intend to strike him?

20 A. In the upper shoulder/torso area of Mr.
21 Fogarty.

22 Q. Would that be in his back or his front?

23 A. Neither. The meaty portion of Mr. Fogarty's

1 right upper arm or torso.

2 Q. Okay. Was he, at the time that you struck
3 him was he still or moving?

4 A. He was moving.

5 Q. And can you describe the movement he was
6 making?

7 A. Sure. He was moving his -- I've already
8 explained this. He was moving his arms, flailing them
9 around. Moving his legs. His body was moving in a
10 violent and tumultuous manner. He was pulling away
11 from the grips of police officers trying to place him
12 into custody.

13 Q. At the time you struck him were you
14 issuing verbal commands?

15 A. Yes.

16 Q. What were your commands?

17 A. To stop resisting. To place your hands
18 behind your back. Commands like that.

19 Q. And was Officer Smith issuing similar
20 commands?

21 A. Yes, he was.

22 Q. Afterwards during the investigation of
23 your use of force, were you represented?

1 A. In terms of did I have an opportunity --

2 Q. Did you have -- let me break it down. Did
3 you have union representation?

4 A. Yes.

5 Q. Who represented you?

6 A. The PBA president, Bob Fitzgerald.

7 Q. Did any other PBA officials ever become
8 involved in your representation?

9 A. Well, this is over the course of four years.
10 Are you talking about during the interview or --

11 Q. During the whole process of this how many
12 PBA officials represented you?

13 A. Bob Fitzgerald, Tommy Hoffman and Ian
14 Collington.

15 Q. And were all three of those BPA's
16 presidents?

17 A. Yes.

18 Q. Did you also have attorney representation
19 in the disciplinary process or any investigation
20 process?

21 A. I personally did not have an opportunity.
22 The PBA retains a law firm, yes.

23 Q. And what is the name of that law firm?

1 A. Gleason, Dunn, O'Shea and Walsh, I believe.
2 I don't know if I got them all.

3 Q. Did a member of that firm appear with you
4 or for you in the investigatory process?

5 A. Appear?

6 Q. Was someone with you during your
7 interview?

8 A. No, he wasn't there during the interview.

9 Q. Do you know if he communicated with -- do
10 you know if any attorney from that firm communicated
11 with the Troy Police Department regarding the
12 investigation?

13 A. Yes. There was correspondence. I believe
14 there was a letter that he drafted, yes.

15 Q. Did any of the officials from the PBA that
16 you named or the attorney which represents the PBA
17 accept the findings of Captain Buchanan regarding your
18 use of force?

19 MR. BAILEY: By "accept" you mean
20 agree with?

21 Q. Agree with. Accept as an agreement?

22 A. Accept -- I guess I don't understand the
23 question.

1 Q. Okay. Let me try to rephrase it. Did the
2 PBA contest the findings or argue against the finding
3 that Captain Buchanan came up with?

4 A. Yes.

5 Q. All right. And their attorney took the
6 same position the finding was wrong, is that correct?

7 A. Who's attorney? My attorney?

8 Q. The PBA attorney.

9 A. Yes. Well, that's -- yes.

10 Q. Do you know if they discussed this matter
11 with the Troy Police Department officials, their view
12 that the finding was incorrect?

13 A. Who is "they"?

14 Q. "They" meaning the PBA officials and your
15 representation of PBA and the PBA attorney?

16 A. I'm aware of a letter. I wasn't physically
17 present during any of the conversations. But I was
18 told that there was discussion, yes.

19 Q. And to the best of your knowledge they
20 were discussions on your behalf? They were contending
21 that you didn't use excessive force?

22 A. Correct.

23 Q. In your view were the baton strikes that

1 you intend to give to Mr. Fogarty consistent with your
2 training and the policies of the Troy Police
3 Department regarding used of the baton?

4 A. Not only were consistent with it but, yes.
5 Very, very consistent with the training then and as
6 they continue to train. We still train. The City of
7 Troy Police Department still trains myself and other
8 officers in that exact same convention, yes.

9 Q. So if you hit Mr. Fogarty in the head with
10 your baton, would you describe that as an accident?
11 Or how would you describe that event?

12 A. I would describe it as somewhat of an
13 unfortunate circumstance of events that this can be
14 considered collateral damage to a reasonable use of
15 force. You know, baton strikes were delivered in a
16 reasonable manner. And unfortunately, in this type of
17 an incident, specifically this one, he is not standing
18 there static, not moving. He is moving and so when you
19 intend to hit a certain area and the subject moves or
20 ducks to avoid being hit, sometimes, you know,
21 inadvertently you may miss the target that you're
22 trying to hit.

23 Q. His head was not your target?

1 A. His head was absolutely not my target.

2 MR. MORRISSEY: No more questions.

3 **EXAMINATION BY MR. CALABRESE:**

4 Q. When you and Officer Smith were attempting
5 to place Mr. Fogarty under arrest, was Mr. Fogarty
6 yelling?

7 MR. BAILEY: Asked and answered,
8 but go ahead.

9 A. Yes.

10 Q. All right. Do you remember what he was
11 yelling?

12 A. I mean, I kind of responded to this already.
13 The exact words and verbiage I don't, but in general he
14 didn't want to be under arrest. He was trying to stop
15 us from arresting him.

16 Q. Was it constant? As you were arresting or
17 as you sit here today do you remember any other noises
18 coming from your surroundings that were loud? If you
19 remember?

20 A. No. I don't specifically remember any other
21 loud noises.

22 Q. All right. Were there any dogs barking in
23 the background that you remember?

1 A. Not that I remember.

2 Q. Okay. Again, this was at night, correct?

3 A. Correct.

4 Q. And so would it be fair to say there
5 wasn't much traffic going by on the street?

6 A. That would be fair, yes.

7 Q. Okay. And it would be fair to say there
8 wasn't anybody around the three of you yelling at you
9 guys, that you remember?

10 A. This is at the time that we were putting him
11 -- on State Street you're talking about?

12 Q. Yes.

13 A. I don't believe that there was a crowd or
14 anybody else standing around.

15 Q. All right. Have you ever used your baton
16 before this incident on a person?

17 A. Yes.

18 Q. Okay. When you're trained on how to use a
19 baton, do you use it on another person or no?

20 A. Well, that's a broad question. When you're
21 -- yes and no. I mean, different aspects of how you
22 use the baton you are sort of using it. Certain times
23 you don't use it. You would maybe use a dummy or a bag

1 to strike.

2 Q. Have you ever struck a bone before with a
3 baton?

4 MR. BAILEY: Struck a bone?

5 Object to the form. Go ahead and
6 answer.

7 Q. Have you ever struck somebody else -- I
8 mean. Let me try to ask that in a better way. Prior
9 to this incident have you ever used your baton on a
10 civilian and your baton came in contact with their
11 bone when you struck them?

12 MR. BAILEY: Object to the form.

13 You can answer.

14 A. I mean, I can't specifically remember a name
15 or a date and time that something like that happened.
16 I can't remember that.

17 MR. CALABRESE: All right. I have
18 no further questions. Thank you.

19 (Whereupon the deposition was
20 concluded at 1:37 p.m.)

21 * * * *

22

I N D E X O F E X H I B I T S

<u>Plaintiff's</u> <u>Exhibit</u>	<u>Description</u>	<u>Page</u>
1	Incident Report	3
2	Control/Restraint Order	3
3	Domestic Incident Report	3
4	Letter/Commissioner Magnetto	3
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STATE OF NEW YORK

SS:

COUNTY OF _____

I have read the foregoing record of my
testimony taken at the time and place noted in the
heading hereof and I do hereby acknowledge it to be a
true and accurate transcript of same.

KYLE JONES

Sworn to before me this

____ day of _____, 2016.

Notary Public

CERTIFICATION

STATE OF NEW YORK

COUNTY OF ALBANY

I, Mary Ellen Tardiff, shorthand reporter, a notary public within and for the State of New York, duly commissioned and qualified, do hereby certify that **Kyle Jones** was duly sworn by me to testify to the truth in the cause aforesaid; that the testimony then given was reduced by me to stenotype in the presence of said witness, subsequently transcribed into English text and that the foregoing is a true and accurate transcript of the testimony so given.

I do hereby certify that his testimony was taken **January 23, 2017**, at the place as specified in the foregoing caption.

I do hereby further certify that I am not a relative, counsel or attorney of any party or otherwise interested in the outcome of this action.

Witness my hand this 31st day of January, 2017.

MARY ELLEN TARDIFF

Notary Public for State of New York
Commissioned in Albany County
My commission expires 11/07/2018.
UID 01TA4943991